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ALERT

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## Proposed FIRPTA Regulations Provide Clarity for Pension Funds

### ***New IRS guidance issued on qualified foreign pension fund exception***

On June 6, 2019, the U.S. Treasury released proposed regulations under Internal Revenue Code section 897(l) providing guidance for qualified foreign pension funds ("QFPF") for purposes of the Foreign Investment in Real Property Tax Act ("FIRPTA"). Congress enacted section 897(l) in 2015 to exempt certain pension funds from the FIRPTA regime.

Overall, the proposed regulations provide clarity as to what constitutes a QFPF and, in some areas, welcome flexibility to the statutory requirements. For example, these regulations permit certain common indirect and pooled ownership arrangements and allow funds to provide a small amount of ancillary benefits without adversely impacting QFPF status. However, the IRS declined to bless *de minimis* ownership by nonqualifying persons.

Other key aspects of the proposed regulations include:

**Definitions.** Taxpayers should be aware that a "pension fund" for purposes of a U.S. income tax treaty or an intergovernmental (FATCA) agreement is not necessarily a QFPF.

**Withholding.** QFPFs will in the future be able to use Form W-8EXP to certify QFPF status. This is a practical and user-friendly approach—or it will be once the modified form becomes available. The QFPF exception pertains only to FIRPTA and does not necessarily exempt pension funds from other potentially applicable taxes, including withholding taxes imposed by sections 1442 (payments to foreign corporations) and 1446 (withholding on foreign partners).

**Anti-abuse.** The regulations contain an anti-abuse provision with an extended lookback period of up to 10 years that may cause practical issues down the road.

**Effective Dates.** Although the regulations generally will become effective only after finalized, certain provisions are effective immediately, including most definitional aspects of the rules. Taxpayers may, however, rely on the proposed regulations for transactions dating back to December 2015 if they consistently comply with the regulations.



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